LOW CHIN MENG v. CIMB ISLAMIC BANK BHD

COURT OF APPEAL, PUTRAJAYA
ROHANA YUSUF JCA
IDRUS HARUN JCA
ABDUL RAHMAN SEBLI JCA
[CIVIL APPEAL NO: W-02(MUA)(W)-273-02-2014]
29 DECEMBER 2014

BANKING: *Islamic banking – Loan facility – Al Bai Bithaman Ajil – Default – Claim against guarantor – Whether memorandum of deposit of securities operated as guarantee document – Whether constituted contract of guarantee under s. 79 of Contracts Act 1950 – Inconsistencies in documents – Whether contra preferentem rule applied – Whether there was compliance with ss. 67 and 67A of Companies Act 1965 – Whether share sale and share repurchase transactions were sham and illegal – Whether court had properly referred to Syariah Advisory Council for rulings – Central Bank of Malaysia Act 2009, s. 56(1)*

COMPANY LAW: *Shares – Dealing by company with its own shares – Whether company provided financial assistance to third party to buy its shares – Share sale and share repurchase transactions made as security for Al Bai Bithaman Ajil loan facility – Whether transactions resulted in improper diminution or reduction of company's capital – Whether s. 67 of Companies Act 1965 infringed – Whether purported share buy-back by company was 'purchase' as envisaged in s. 67A Companies Act 1965 – Companies Act 1965 ss. 67 & 67A*

CONTRACT: *Construction of contracts – Contra preferentem rule – Whether applicable – Whether there was inconsistency in contract documents – Whether court bound by labels affixed by parties – Whether document should be construed as a whole*

CONTRACT: *Guarantee – Loan facility – Claim against guarantor – Whether memorandum of deposit of securities operated as constituted guarantee document – Whether a contract of guarantee under s. 79 of Contracts Act 1950*

LCL Corporation Bhd ('the company') was a public listed company. The appellant was the company's major shareholder, managing director and executive chairman. The company secured an Islamic finance facility known as '*Al Bai Bithaman Ajil*' Facility ('the first BBA facility') from the respondent in the sum of RM62.250 million. The company and the respondent then entered into an asset purchase and an asset sale agreements as security for the loan. To this end, a series of transactions were undertaken by the appellant, the company and the respondent beginning with a letter of *hibah* executed by the appellant purportedly conveying to the company by way of a gift 16,000,000 shares ('the shares') valued at RM35,520,000 which was owned by the appellant in the company. It was next followed with an asset purchase agreement between the company and the respondent wherein the respondent purchased the shares from the company for the sum of RM25 million. The

respondent and the company subsequently executed an asset sale agreement wherein the respondent sold the shares to the company. Finally, a letter of *hibah* was executed by the company in respect of the shares in favour of the appellant. Upon completion of these series of transactions, the 16,000,000 shares were deposited by the appellant with the respondent as a security by a memorandum of deposit of securities ('memorandum'). Subsequently the respondent granted the company a second facility ('the second BBA facility') for the purpose of repaying the first BBA facility. The same legal documentation was repeated using the same shares as security. The transactions were next repeated three times involving the shares so that at the end of the whole exercise the aggregate sums of the purchase price and the sale price under the four asset purchase agreements and four asset sale agreements ultimately stood at RM48,500,000 and RM64,350,000 respectively. The company defaulted in the repayment and consequently the respondent, exercising its rights under the memorandum, sold the shares at the price of RM3,666,822.80. The proceeds from the disposal of the shares were not sufficient to recover the outstanding sum and as such, the respondent commenced the present suit against the company and the appellant seeking the payment for the shortfall pursuant to the memorandum amounting to RM54,442,744.78. The High Court Judge ('judge') allowed the respondent's claim. Aggrieved, the appellant appealed against the decision of the judge on the grounds, *inter alia*, that: (i) by pledging the shares in favour of the respondent, the appellant was a security party to the second BBA facility and not a guarantor; (ii) there was inconsistency in the documents in the BBA transactions and as such the *contra preferentem* rule applied in his favour; and (iii) there had been non-compliance with ss. 67 and 67A of the Companies Act 1965 ('Act 125') resulting in illegality in the transactions. The appellant further claimed that the shares which was worth a mere RM9,440,000 had been 'recycled' three more times so that the value thereof would be equivalent to RM48,500,000 in respect of the purchase price for the four asset purchase agreements. Hence, the appellant argued that the transactions were a sham and illegal therefore invalid and unenforceable. The judge had referred the matter to the Syariah Advisory Council ('the Council') for a ruling pursuant to s. 56(1) of the Central Bank of Malaysia Act 2009 ('CBMA 2009').

Held (dismissing appeal with costs)

Per Idrus Harun JCA delivering the judgment of the court:

(1) The memorandum created a charge of the shares in favour of the respondent for the purpose of the second BBA facility as a continuing security for the payment of the company's indebtedness. It also provided for a guarantee by the appellant that should the company default in its scheduled repayments to the respondent, and the respondent sold off the shares and the amount obtained from such sale or disposal was deficient, the appellant guaranteed that he would make up such deficiency. This guarantee was over and above the security he created in the form of the

shares which were charged to the respondent. This arrangement fell within the definition of 'contract of guarantee' under s. 79 of the Contracts Act 1950. The remedy of the creditor therefore was to sue the surety on his own undertaking in the contract of guarantee, if the principal debtor who was not a party to the contract of guarantee defaulted. (para 25)

(2) In the construction of contracts the court was not bound by the labels that the parties choose to affix onto the particular document. The duty of the court was to construe the document as a whole and to determine from its language and any other admissible evidence its true nature and purport. Clause 2.1 of the memorandum ought not to be read in isolation as there was also cl. 6 which dealt with the guarantee that the appellant had provided to the respondent. All the relevant provisions in the memorandum clearly showed that the memorandum was also a contract of guarantee apart from providing a security for the second BBA facility. (para 28)

(3) The judge took the right step in referring the matter to the council for its ruling in compliance with s. 56(1) of the CBMA 2009 which made it mandatory for the court to do so when any question arose concerning a syariah matter. Any such ruling made by the council by virtue of s. 57 CBMA 2009 was binding on the court. Based on the rulings of the council, the judge correctly concluded that the BBA transactions were valid and that the asset purchase agreements and the asset sale agreements were enforceable. As such the BBA transactions were not sham, void and unenforceable. (paras 32, 34 & 35)

(4) The stipulations in cls. 8.4 and 6.1 were explicit and clearly expressed. There was no conflict nor contradiction between both clauses. No ambiguity existed attracted the application of the *contra preferentem* rule so that the preferred meaning should be the one that worked against the respondent which relied on cl. 6.1. The stipulation in cl. 8.4 did not absolve the appellant from liability to pay for the deficient amount under cl. 6.1 of the memorandum. (para 40)

(5) The prohibition in s. 67(1) of Act 125 could be divided into two limbs (i) giving financial assistance for the acquisition of its shares or shares in its holding company; and (ii) purchasing, dealing in or lending money on its own shares. There was no evidence to show that financial assistance was given by the company to anyone to purchase its own shares. Accordingly, the first limb did not apply to the BBA transactions. The company also did not do any of those acts mentioned in s. 67(1). As for the second limb, there was no evidence to show that the BBA transactions had resulted in the improper diminution or reduction of the capital of the company. (paras 49, 50 & 51)

(6) The main purpose of the prohibited transactions under s. 67(1) was to enable a person to acquire the company's shares. However, if the transactions did not result in the reduction of the capital of the company, there was no objection to a company dealing in its shares. The company did not do anything that was prescribed by s. 67(1) of Act 125. The asset purchase agreements and the asset sale agreements executed by the respondent and the appellant were not caught by s. 67. The purported shares buy-back by the company from the respondent was also not a 'purchase' envisaged in s. 67A. (paras 52, 64 & 70)

Bahasa Malaysia *Translation Of Headnotes*

LCL Corporation Bhd ('syarikat') adalah sebuah syarikat yang disenarai umum. Perayu adalah pemegang saham utama, pengarah dan pengerusi eksekutif pengurusan syarikat. Syarikat telah memperolehi satu kemudahan pinjaman kewangan Islam yang dikenali sebagai '*Al Bai Bithaman Ajil*' ('kemudahan BBA pertama') daripada responden berjumlah RM62.250 juta. Syarikat dan responden telah memeterai satu perjanjian pembelian aset dan penjualan aset sebagai cagaran untuk pinjaman tersebut. Untuk tujuan ini, satu siri transaksi telah dijalankan oleh perayu, syarikat dan responden yang bermula dengan satu surat *hibah* yang dimeterai oleh perayu kononnya memberikan kepada syarikat secara hadiah 16,000,000 saham ('saham-saham') bernilai RM35,520,000 yang dimiliki oleh perayu dalam syarikat. Ini seterusnya diikuti dengan perjanjian pembelian aset antara syarikat dan responden di mana responden telah membeli saham dari syarikat sebanyak RM25 juta. Responden dan syarikat seterusnya telah memeterai satu perjanjian penjualan aset di mana responden telah menjual saham-saham kepada syarikat. Akhirnya, satu surat *hibah* telah dimeterai oleh syarikat berkenaan saham bagi pihak perayu. Apabila selesai siri-siri transaksi berikut, 16,000,000 saham tersebut telah didepositkan oleh perayu dengan responden sebagai cagaran oleh satu memorandum deposit sekuriti ('memorandum'). Seterusnya responden telah memberikan syarikat kemudahan kedua ('kemudahan BBA kedua') bagi tujuan membayar balik kemudahan BBA pertama. Dokumentasi undang-undang yang sama telah diulangi dengan menggunakan saham-saham yang sama sebagai cagaran. Urus niaga diulangi sebanyak tiga kali melibatkan saham-saham tersebut supaya pada akhir seluruh transaksi jumlah agregat daripada harga belian dan harga jualan di bawah perjanjian pembelian aset di bawah keempat-empat perjanjian pembelian aset dan perjanjian penjualan aset akhirnya akan berjumlah sebanyak RM48,500,000 dan RM64,350,000 masing-masing. Syarikat gagal dalam pembayaran balik, seterusnya responden dalam menguatkuasakan haknya di bawah memorandum telah menjual saham-saham pada harga RM3,666,822.80. Hasil daripada jualan saham-saham tersebut tidak mencukupi untuk menuntut jumlah terhutang. Oleh itu, responden telah memulakan tindakan guaman ini terhadap syarikat dan menuntut bayaran yang berkurangan menurut memorandum yang berjumlah RM54,442,744.78. Hakim Mahkamah Tinggi ('hakim') telah membenarkan

tuntutan responden. Terkilan, perayu telah merayu terhadap keputusan hakim atas alasan, antara lain, bahawa (i) dengan mencagarkan saham bagi pihak responden, perayu merupakan pencagar untuk kemudahan BBA kedua dan bukanlah penjamin; (ii) terdapat percanggahan dalam dokumen urus niaga BBA dan oleh itu peraturan *contra preferentem* adalah terpakai dan berpihak kepada perayu; dan (iii) telah berlaku ketidakpatuhan ss. 67 dan 67A Akta Syarikat 1965 ('Akta 125') yang menyebabkan urus niaga tersebut menyalahi undang-undang. Perayu juga mendakwa saham yang bernilai RM9,440,000 semata-mata 'dikitar semula' sebanyak tiga kali supaya nilainya akan bersamaan dengan RM48,500,000 berkaitan dengan harga belian keempat-empat perjanjian pembelian aset tersebut. Oleh itu, perayu menegaskan bahawa urus niaga tersebut adalah satu penipuan dan oleh itu tidak sah dan tidak boleh dikuatkuasakan. Hakim telah merujuk perkara tersebut kepada Majlis Penasihat Syariah ('Majlis') untuk keputusan menurut s. 56 (1) Akta Bank Negara Malaysia 2009 ('CBMA 2009').

Diputuskan (menolak rayuan itu dengan kos)
Oleh Idrus Harun HMR menyampaikan penghakiman mahkamah:

(1) Memorandum telah mewujudkan pajakan saham-saham yang memihak kepada responden untuk tujuan kemudahan BBA kedua sebagai cagaran berterusan bagi pembayaran hutang syarikat. Ia juga menyediakan suatu jaminan oleh perayu bahawa jika syarikat gagal dalam pembayarannya kepada responden, dan responden menjual saham-saham dan jumlah yang diperolehi daripada jualan atau pelupusan tersebut adalah kekurangan, perayu menjamin menggantikan kekurangan tersebut. Jaminan ini adalah melebihi dan di atas cagaran yang diwujudkan dalam bentuk saham-saham yang telah dipajakkan kepada responden. Pengaturan ini terjatuh ke dalam takrif 'contract of guarantee' di bawah s. 79 Akta Kontrak 1950. Remedi pemiutang adalah untuk mendakwa penjamin berdasarkan aku janjinya sendiri dalam 'contract of guarantee', jika penghutang utama yang tidak menjadi pihak kepada 'contract of guarantee' yang termungkir.

(2) Dalam tafsiran kontrak, mahkamah tidak terikat dengan label yang dipilih oleh pihak-pihak untuk ditambahkan kepada dokumen. Tugas mahkamah adalah untuk mentafsirkan dokumen secara menyeluruh dan untuk menentukan dari segi bahasa dan apa-apa keterangan lain yang boleh diterima sifatnya yang sebenar dan yang dikatakan. Fasal 2.1 memorandum tidak sepatutnya dibaca secara berasingan kerana terdapat juga fasal 6 yang berurusan dengan jaminan yang diberikan oleh perayu kepada responden. Semua peruntukan yang berkaitan dalam memorandum jelas menunjukkan bahawa memorandum juga merupakan 'contract of guarantee' selain menyediakan sekuriti untuk kemudahan BBA kedua.

(3) Hakim telah mengambil langkah yang betul dalam merujuk perkara tersebut kepada Majlis untuk keputusannya selaras dengan keperluan s. 56 (1) CBMA 2009 yang menjadikannya mandatori bagi mahkamah untuk berbuat demikian apabila apa-apa persoalan timbul mengenai perkara syariah. Sebarang keputusan yang dibuat oleh Majlis menurut s. 57 CBMA 2009 mengikat mahkamah. Berdasarkan keputusan Majlis, hakim telah dengan betul membuat kesimpulan bahawa urus niaga BBA adalah sah dan bahawa perjanjian pembelian aset dan perjanjian penjualan aset boleh dikuatkuasakan. Oleh itu, transaksi BBA bukan merupakan suatu penipuan, adalah sah dan boleh dikuatkuasakan.

(4) Peruntukan-peruntukan dalam fasal 8.4 dan 6.1 adalah dinyatakan dengan jelas. Tidak ada konflik atau percanggahan diantara kedua-dua fasal tersebut. Tiada kekaburan yang wujud yang akan menarik penggunaan peraturan *kontra preferentem* supaya makna yang sesuai menjadi suatu yang diguna pakai terhadap responden yang bergantung kepada fasal 6.1. Peruntukan dalam fasal 8.4 tidak membebaskan perayu daripada liabiliti untuk membayar jumlah yang kekurangan di bawah fasal 6.1 memorandum.

(5) Larangan di bawah s. 67(1) Akta 125 boleh dibahagikan kepada dua bahagan iaitu (i) memberi bantuan kewangan bagi memperolehi saham-saham atau saham-saham dalam syarikat induknya; dan (ii) pembelian, perniagaan atau pinjaman wang atas saham-saham sendiri. Tiada bukti yang menunjukkan bahawa bantuan kewangan telah diberikan oleh syarikat kepada sesiapa untuk membeli saham-saham sendiri. Oleh itu, bahagian pertama tidak terpakai bagi transaksi BBA. Syarikat juga tidak melakukan apa-apa perbuatan yang dinyatakan dalam s. 67(1) Akta 125. Bagi bahagian kedua, tiada bukti yang menunjukkan bahawa urus niaga BBA telah menyebabkan pengurangan yang tidak sepatutnya atau pengurangan modal syarikat.

(6) Tujuan utama urus niaga yang dilarang di bawah s. 67(1) Akta 125 adalah untuk membolehkan seseorang untuk membeli saham-saham syarikat. Walau bagaimanapun, jika transaksi-transaksi tersebut tidak menyebabkan pengurangan modal syarikat, tiada sebarang bantahan terhadap sebuah syarikat yang terlibat dalam saham-sahamnya. Syarikat tidak melakukan apa-apa yang diperuntukkan oleh s. 67(1) Akta 125. Perjanjian pembelian aset dan perjanjian penjualan aset yang dimeterai oleh responden dan perayu tidak ditangkap oleh s. 67 Akta 125. Saham yang dibeli balik oleh syarikat daripada responden juga bukan 'pembelian' seperti yang diperuntukkan dalam s. 67A Akta 125.

Case(s) referred to:

Bank Kerjasama Rakyat Malaysia Bhd v Sea Oil Mill (1979) Sdn Bhd & Anor [2010] 1 CLJ 793 FC ***(refd)***

Burton & Co v. English & Co [1883] Vol. XII 1883 ***(refd)***

Dato' Hj Nik Mahmud Daud v. Bank Islam Malaysia Bhd [1996] 1 CLJ 576 HC ***(refd)***

Ginlon (M) Sdn Bhd v. MBf Finance Bhd [2004] 2 CLJ 169 CA ***(refd)***

Intraco Ltd v. Multi-Pak Singapore Pte Ltd [1995] 1 SLR 313 CA ***(refd)***
Johor Coastal Development Sdn Bhd v. Constrajaya Sdn Bhd [2005] 2 CLJ 914 CA ***(refd)***
Lori Malaysia Bhd v. Arab-Malaysia Finance Bhd [1999] 2 CLJ 997 FC ***(refd)***
Mookapillai & Anor v. Liquidator, Sri Saringgit Sdn Bhd & Ors [1981] 1 LNS 89 FC ***(refd)***
Re Exchange Banking Co, Flitcroft's Case (1882) 21 ChD 519 ***(refd)***
Sia Siew Hong & Ors v. Lim Gim Chian & Anor [1996] 3 CLJ 26 CA ***(refd)***
Skelton v. South Auckland Blue Metals Ltd [1969] NZLR 955 ***(refd)***
Sri Alam Sdn Bhd v. Newacres Sdn Bhd [1997] 3 CLJ 640 CA ***(refd)***
Trevor v. Whitworth (1887) 12 App Cas 409 ***(refd)***

Legislation referred to:
Central Bank of Malaysia Act 2009, ss. 56(1), 57
Companies Act 1965, ss. 64, 67, 67A, 103
Contracts Act 1950, ss. 24, 79, 81
Kelantan Malay Reservations Enactment 1930, ss. 7, 12

Other source(s) referred to:
The Annotated Statutes Of Malaysia: Companies Act 1965 (Act 125), p. 278

For the appellant - Tan Keng Teck (Lui Kar Yee with him); M/s Lim Kian Leong & Co
For the respondent - Mohamed Ismail Shariff (Fitriyah Abdullah & Cho Cheng Yu with him); M/s Azim, Tunku Farik & Wong

[Editor's Note: For the High Court judgment, please see CIMB Islamic Bank Berhad v. LCL Corporation Berhad & Anor [2014] 1 LNS 648.]

Reported by Amutha Suppayah

JUDGMENT

Idrus Harun JCA:

Background Facts

[1] To appreciate the contentions that have been raised before the court, it would be most apposite to state at the outset the material facts. The learned judge in this regard had set out the facts of this case so extensively with characteristic clarity that we find it unnecessary to delve into the facts in great detail.

[2] LCL Corporation Bhd (the company) was at the material time a public listed company whose shares were traded on the open market at the Bursa Malaysia Berhad. Low Chin Meng, the appellant in this appeal was the company's major shareholder, managing director and executive chairman. Both the company and the appellant were parties in this civil suit before the High Court as the first defendant and the second defendant respectively.

[3] On or about 2007, the company through its subsidiaries secured fit out contracts from its overseas ventures in the Middle East. To secure funds for its Middle East project and on the advice of CIMB Investment Bank Berhad, its corporate adviser, the company implemented a private placement and rights issue exercises. The corporate exercises as the evidence has revealed, would require some time to complete. In the event, as an interim measure,

A the company secured a short term funding from CIMB Bank Berhad in the sum of RM50 million (the conventional loan facility). Eventually the private placement exercise had successfully raised funds of approximately RM35.95 million when it was completed on 5 November 2007. As for the rights issue exercise however, the exercise was expected to be completed by June 2008. B It was intended that the proceeds from the rights issue exercise would be the principal source of fund to repay the conventional loan facility.

[4] However, nothing turned out the way it was expected. The implementation of the rights issue exercise was delayed. The company therefore was unable to repay the conventional loan facility. What followed thereafter C was that the company secured an Islamic finance facility known as 'Al Bai Bithaman Ajil' facility (the first BBA facility) from the respondent in the sum of RM62.250 million to repay the conventional loan facility.

[5] The company and the respondent, under the terms and conditions of the first BBA facility, had to enter into an asset purchase agreements with D respect to which the company would sell to the respondent assets up to the value of RM50 million. In addition, by way of an asset sale agreement, the company would repurchase those assets from the respondent at a purchase price of RM62.250 million to be paid on a deferred basis over a period of 24 months. But as an alternative, the relevant terms and conditions of the first E BBA facility provided that the company could pay the purchase price by way of the proceeds from the rights issue exercise.

[6] To this end, a series of transactions were undertaken by the appellant, the company and the respondent beginning with a letter of *hibah* dated 28 August 2008 executed by the appellant purportedly conveying to the F company by way of a gift 16,000,000 shares with value of RM35,520,000 owned by the appellant in the company. It was next followed with an asset purchase agreement between the company and the respondent dated 28 August 2008 to which the respondent purportedly purchased the said 16,000,000 shares from the company for the sum of RM25 million. The G respondent and the company subsequently executed an asset sale agreement dated 28 August 2008 to which the respondent purportedly sold the 16,000,000 shares to the company for the sum of RM31.125 million. Finally, a letter of *hibah* dated 28 August 2008 was executed by the company in respect of the 16,000,000 shares in favour of the appellant.

H **[7]** These series of transactions were repeated a second time using the said 16,000,000 shares. Upon completion of these series of transactions, the 16,000,000 shares were deposited by the appellant with the respondent as a security by a memorandum of deposit of securities dated 23 September 2008.

I **[8]** However, by the end of 2008, the implementation and completion of the rights issue exercise were once again delayed. As a result, the company was without the financial means to comply with the repayment schedules under the first BBA facility.

[9] Subsequently by a letter of offer dated 17 April 2009, the respondent granted a second facility based on the same Islamic finance concept of "Al Bai Bithaman Ajil" (the second BBA facility) of RM48.5 million to the company for the purpose of repaying the first BBA facility. On 24 April 2009, the appellant executed a letter of *hibah* purportedly conveying to the company by way of a gift involving the same 16,000,000 shares (the shares) used in the first BBA facility with value of RM9,440,000 owned by him in the company. With the execution of the letter of *hibah*, the company entered into an asset purchase agreement with the respondent to which the respondent purportedly purchased the shares from the company for the sum of RM12,125,000 and followed immediately with the repurchase of the shares by the company for the sum of RM16,087,500 from the respondent by way of an asset sale agreement entered into between the company and the appellant. The company in turn re-conveyed the shares by way of a gift to the appellant by executing a letter of *hibah*.

[10] The transactions were next repeated three times by the parties thereto involving the shares so that at the end of the whole exercise the aggregate sums of the purchase price and the sale price under the four asset purchase agreements and four asset sale agreements would ultimately stand at RM48,500,000 and RM64,350,000 respectively. It is to be observed that the letters of *hibah*, the asset purchase agreements and the asset sale agreements were executed on 24 April 2009. The second BBA facility according to the letter of offer dated 17 April 2009 would expire on 30 November 2011.

[11] Upon the conveyance of the shares by the company to the appellant, a memorandum of deposit of securities (the memorandum) was executed by the appellant on 24 April 2009 pledging the shares to the respondent. The memorandum would serve as a security for the payment of the amount under the second BBA facility. The company, as it turned out, had defaulted in the payment of the monthly instalments and consequently the respondent in exercising its rights under the memorandum sold the shares on 11 February 2007 at the price of RM3,666,822.80. Obviously the proceeds from the disposal of the shares was not sufficient to recover the outstanding sum. In the event, the respondent commenced the present suit against the company and the appellant seeking the payment for the shortfall pursuant to the memorandum amounting to RM54,442,744.78 as at 18 November 2010. The appellant counter-claimed against the respondent the sum of RM35,520,000 as damages suffered by him for unlawful disposal of the shares by the respondent which he alleged had resulted in the company to collapse. He also sought a declaration that the transactions entered into were null and void.

[12] The respondent, by way of an O. 14 application, obtained a summary judgment from the High Court on 9 February 2011 against the company and the appellant. The appellant's appeal to the Court of Appeal was unanimously

dismissed on 6 October 2011, however on further appeal to the Federal Court, the appellant's appeal was allowed. The case was remitted to the High Court for trial on the merits.

[13] We pause to observe that after the summary judgment was entered against the company and the appellant, the company was wound up on 17 June 2011. The company did not obtain leave to proceed with the appeal against the summary judgment therefore in law, the said summary judgment as against the company still stands. That being the case, the trial of this case before the High Court proceeded without the company as a party. So was the appeal before this court.

[14] After a full hearing and upon assessing the evidence adduced by the parties, the learned judge accordingly at the conclusion of the trial allowed the respondent's claim against the appellant and dismissed the appellant's counter-claim with costs. The appellant appeals against the decision to this court.

[15] In summary, the learned judge had decided amongst others, that the memorandum executed by the appellant was not only a charge but also provided a personal guarantee pursuant to cl. 6 thereof, that the second BBA facility had also conformed with the advice given by Syariah Advisory Council of Bank Negara Malaysia (the council) and that there was no evidence to show that ss. 67 and 67A of the Companies Act 1965 had been contravened in the course of carrying out the BBA transactions leading to the granting of the second BBA facility by the respondent to the company.

Grounds Of Appeal

[16] Before us, learned counsel raised several issues under the following headings:

(a) The appellant's status in the BBA transactions;

(b) Inconsistency of documents in the BBA transactions - The *contra preferentem* rule; and

(c) Non-compliance with ss. 67 and 67A of the Companies Act 1965 (Act 125).

The Appellant's Status In The BBA Transactions

[17] Before we go more closely into the merits of the arguments of learned counsel for the appellant on this issue, it is desirable to state his arguments on this ground. Basically, the thrust of his arguments is that the appellant, by pledging the shares in favour of the respondent, was a security party to the second BBA facility. He was not a guarantor. Since the company was the principal party, in the event the second BBA facility was found to be illegal, the appellant's purported liability to the respondent would be completely extinguished. The manner the BBA transactions was carried out was questioned by the appellant as being a sham and illegal and as such the asset purchase agreement and the asset sale agreement were invalid and unenforceable.

[18] It is perhaps convenient to mention at this point that the appellant's right to challenge the validity of the BBA transactions had been considered by the learned judge in her judgment as an issue of law wherein Her Ladyship had ruled that since the company did not appeal against the judgment of the High Court in the summary judgment proceedings, it is not open to the appellant in any event to challenge the validity of the BBA transactions when the said judgment still remains. We have no reason to disagree with her ruling that the judgment remains. It follows therefore that the appellant's liability as a guarantor should also remain.

[19] In support of the above finding, we refer to the case of *Bank Kerjasama Rakyat Malaysia Bhd v Sea Oil Mill (1979) Sdn Bhd & Anor* [2010] 1 CLJ 793 wherein the question which was considered by the Federal Court was whether the second respondent as a guarantor to the Islamic banking facility of *Al-Tarkhis* could again raise issues decided by the High Court against the first respondent as the principal borrower, whereas judgment against the first respondent was maintained by the Court of Appeal and, furthermore, the second respondent did not and had never challenged the guarantee agreement signed. It was held that since the first respondent's appeal was struck out, it meant that the O. 14 summary judgment given by the High Court against the first respondent still remained. It followed that the second respondent's liability as the guarantor for the first respondent also remained by virtue of s. 81 of the Contracts Act 1950. The suit by the appellant against the second respondent as the guarantor was therefore valid.

[20] It is not disputed that the appellant did not execute any personal guarantee agreement with the respondent. However, the appellant undeniably executed the memorandum.

[21] Learned counsel for the appellant placed reliance on cl. 2.1 of the memorandum in advancing his argument that the same is not a guarantee. Clause 2.1 thereof provides as follows:

2. CREATION OF SECURITY

2.1 In consideration of your agreeing at our request or the request of the Customer to provide, having provided, providing and/or continuing to provide financing facilities or other accommodations from time to time, including granting such financing facilities to us or the Customer pursuant to the General Facility Agreement, *we hereby charge the Securities to you or such agent or nominee as you may in your absolute discretion nominate as a continuing security for the payment and satisfaction ON DEMAND of the Indebtedness and/or the Bank's Selling price to you (and irrespective of whether or not the banker customer relationship between you and the Customer and/or us have ceased or been terminated)* including:-

(a) in the case of our insolvency and/or the insolvency of the Customer all sums which would have been owing to you by us or the Customer if such liquidation had commenced at the time

A when you receive actual notice of the presentation of a petition or the passing of a resolution to wind up in the case of a liquidation and notwithstanding such liquidation.

(b) all monies obtained from or liabilities incurred to or by you notwithstanding that the incurring of such liabilities may be invalid or in excess of the powers of the Customer or of any director or attorney, and notwithstanding any other irregularity in incurring such liabilities; and

(c) in the event of the discontinuance by any means of the security hereby created all cheques drafts bills notes and negotiable instruments drawn by or for our account or the account of the Customer or you or your agents and purporting to be dated on or before the date when such discontinuance becomes known to you or your agents although presented to or paid by you after that date and all our liabilities or the liabilities of the Customer to you at such date whether certain or contingent and whether payable forthwith or at some future time or times and also all credits then established by you for us or the Customer (emphasis added).

[22] The reasoning of learned counsel appears to us, with deference to him, to overlook other provisions of the memorandum, in particular cl. 6. In our view, cl. 2.1 cannot be read in isolation. The clause must be considered with cl. 6 of the memorandum which reads:

6. POWER OF SALE

6.1 Upon the happening of any Event of Default, you may without any notice to us or the Customer, realise, sell or dispose of the Securities or any part thereof either together or in parcels, to itself or to any other person(s) either by dealings at any broker's board or by public or private sale or private treaty or in such other manner for such consideration (whether payable or deliverable immediately or by instalments) as you may think fit without being in any way responsible for any loss occasioned thereby howsoever arising. *In the event of any such sale if less than all of the Securities subject hereto are to be sold or disposed of you may in your absolute discretion select which Securities subject hereto are to be sold or disposed of. In the event of any deficiency after the sale of the Securities subject hereto whatsoever and howsoever arising we agree to make good and pay on demand to you such deficiency Provided That nothing herein contained shall be construed as imposing any obligation (whether at law or in equity) upon you to exhaust your remedy to sell the Securities or any part thereof before commencing any separate action or before enforcing any other remedies or exercising any other rights against us or the Customer And we hereby irrevocably and unconditionally agree with and consent to you commencing separate proceedings, enforcing other remedies and exercising any other rights which you may have against us or the Customer simultaneously with and without having exhausted you rights to sell or to proceed against the Securities* (emphasis added).

[23] Based on this clause, it is abundantly clear that where there is any deficiency after the sale of the securities in the event of a default by the company, the appellant had to make good and pay on demand such deficiency to the respondent. In addition, the appellant also agreed that the respondent could also enforce other remedies by commencing proceedings separately from the respondent's right to sell or proceed against the securities. It could also proceed to enforce other remedies by commencing proceedings without exhausting its rights to sell or proceed against the securities. It is to be observed that the securities mentioned in cl. 6 are in fact the shares pledged by the appellant to the respondent.

[24] In this regard, we need to refer to s. 79 of the Contracts Act 1950 which provides:

> 79. A "contract of guarantee" is a contract to perform the promise, or discharge the liability, of a third person in case of his default. The person who gives the guarantee is called the "surety", the person in respect of which default the guarantee is given is called the "principal debtor", and the person to whom the guarantee is given is called the "creditor". A guarantee may be either oral or written.

[25] In our judgment, it is beyond question that the memorandum creates a charge of the shares in favour of the respondent for the purpose of the second BBA facility as a continuing security for the payment and satisfaction on demand of the company's indebtedness. At the same time, it also provides for a guarantee by the appellant that should the company default in its scheduled repayments to the respondent, and the respondent sells or disposes of the shares and the amount obtained from such sale or disposal is deficient, the appellant guarantees that he would make up such deficiency. This guarantee is over and above the security he created in the form of the shares which were charged to the respondent in cl. 2.1. Thus it can be seen that in this arrangement there is a creditor, a principal debtor and a guarantor namely the respondent, the company and the appellant respectively. This arrangement falls neatly within the definition of 'contract of guarantee' under s. 79 of the Contracts Act 1950. The remedy of the creditor therefore is to sue the surety on his own undertaking in the contract of guarantee, if the third person namely the principal debtor who is not a party to the contract of guarantee defaults (see *Ginlon (M) Sdn Bhd v. MBf Finance Bhd* [2004] 2 CLJ 169).

[26] The guarantee, in our opinion, is necessary by reason of the fact that the shares were worth a mere RM9,440,000 when the appellant executed the letter of *hibah* and RM12,125,000 when the respondent purportedly purchased the same from the company for RM48,500,000 and the series of transactions, in conformity with the syariah financing principles, had to be repeated three times for the aggregate value of the shares to be equivalent to its purchase price of RM48,500,000. The guarantee provisions in cl. 6 was without doubt to protect the respondent's interest so that in the event of any

default and the sale of the shares was not sufficient to recover the outstanding balance, the said clause would ensure that the respondent could recover the deficient amount from the appellant.

[27] Needless to say that what the respondent had done was consistent and in keeping with the standard practice of financial or lending institutions to insist on security and guarantee before providing any finance or loan facility. No financial institutions would grant any such facility to any person without insisting an adequate security and guarantee facilities to be provided especially when it is fully aware that the security provided is inadequate to recover the outstanding balance due in the event of a default as was in this case. It would be unthinkable for any financial institution to make a business judgment which is detrimental to its interests. On the contrary, it cannot be gainsaid that any financial institution in carrying out its financial transactions would always act in its best interest. The respondent in this respect had ensured that when the appellant executed the memorandum, cl. 2.1 and cl. 6 thereof would provide both security and guarantee respectively for the second BBA facility. Further, these rights would not cease until the obligations under the memorandum were fully satisfied by the company and the appellant as required of them by cl. 16.1 which reads:

> 16.1 Without prejudice to any other remedy which you may have you shall at any time have the right to consolidate any or all of our account or accounts with you with any of our liabilities and/or the liabilities of the Customer under any other agreement or contract with you and set-off or transfer any sum or sums standing to the credit of any one or more of such accounts agreement or contracts in or towards the satisfaction of any of our liabilities and/or the liabilities of the Customer hereunder. Such right shall be exercised at your absolute discretion and *it is hereby expressly agreed and declared that unless you otherwise agree, our obligations under this Memorandum of Deposit shall not be satisfied except on payment by us and/or the Customer of not only all the Indebtedness and/or the Bank's Selling Price secured hereby but also all monies secured by any other charge or security created by us and/or the Customer or any person through whom we claim in favour of or vested in you* (emphasis added).

[28] In the construction of contracts, the court is not bound by the labels that the parties choose to affix onto the particular document. The duty of the court is to construe the document as a whole and to determine from its language and any other admissible evidence its true nature and purport (see *Sia Siew Hong & Ors v. Lim Gim Chian & Anor* [1996] 3 CLJ 26). Mindful of this settled principle of interpretation, we come to the inescapable conclusion that cl. 2.1 of the memorandum ought not to be read in isolation as there is also cl. 6 thereof which plainly deals with the guarantee that the appellant had provided to the respondent. Thus all the relevant provisions in the memorandum when properly construed clearly show that the memorandum is also a contract of guarantee apart from providing a security

for the second BBA facility and accordingly it falls within the definition of contract of guarantee under s. 79 of the Contract Acts 1950. The appellant's submission on this issue is wholly devoid of any merit as such must be rejected.

[29] We turn to the issue of validity of the BBA transactions. In law, the shares of a company are the property of its shareholders. Only the shareholders can exercise the voting rights that are attached to the shares. The shares of a company are neither an asset nor a liability of the company. For these reasons, we were pressed by learned counsel for the appellant with the argument that the company in this case was incapable of owning and dealing with its own shares. Therefore, the asset purchase agreement and the asset sale agreement entered into between the company and the respondent were invalid and void for want of consideration. The reasons being the company did not own the shares and the money was disbursed by the respondent to the company for a non-existent subject matter. Learned counsel further argued that the principle of syariah law required, and the ruling of the council categorically stated, that the contracting parties to a BBA transaction must own the underlying asset which was being transacted between the parties.

[30] Next, the appellant attacked the manner in which the BBA transactions were being carried out. Firstly, it involved the same asset namely the shares which was worth a mere RM9,440,000. The shares were "recycled" three more times so that the value thereof would be equivalent to RM48,500,000 in respect of the purchase price for the four asset purchase agreements. The shares were then sold by the respondent to the company. This time around, the value of the shares was increased to RM16,087,500 and the same process was repeated where the shares were "recycled" three more times simultaneously with the final value standing at RM64,500,000 being the sale price of the four asset sale agreements. These transactions the appellant claimed, was a sham and illegal therefore invalid and unenforceable.

[31] The learned judge on her part was puzzled from the outset and while the case was proceeding. Her Ladyship was concerned whether this arrangement was possible, legal and acceptable within the syariah financing framework. On 11 November 2013, Her Ladyship accordingly referred the matter to the council for its ruling pursuant to s. 56(1) of the Central Bank of Malaysia Act 2009. In this regard, s. 57 of the Central Bank of Malaysia Act 2009 is also relevant. For convenience we set out below the provisions of both sections:

> 56. (1) Where in any proceedings relating to Islamic financial business before any court or arbitrator any question arises concerning a Syariah matter, the court or arbitrator, as the case may be, shall -
>
> (a) take into consideration any published rulings of the Syariah Advisory Council; or
>
> (b) refer such question to the Syariah Advisory Council for its ruling.
>
> (2) Any request for advice or a ruling of the Syariah Advisory Council under this Act or any other law shall be submitted to the secretariat.

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> 57. Any ruling made by the Syariah Advisory Council pursuant to a reference made under this Part shall be binding on the Islamic financial institutions under section 55 and the court or arbitrator making a reference under section 56.

[32] The learned judge took the right step when she referred the matter to
B the council for its ruling in compliance with s. 56(1) which makes it mandatory for the court to do so when any question arises concerning a syariah matter. Any such ruling made by the council by virtue of s. 57 is binding on the court. Four questions were referred to the council. We do not wish to set out these questions in full as the learned judge had dealt with this
C matter in great detail. Briefly, the questions posed sought an advice of the council on the validity of an asset used repeatedly through *hibah* (gift) and asset purchase and sale agreements, and whether such gift could be returned to the original owner also by way of *hibah* and subsequently used as a security in order to secure the repayment of the loan worth four times the original value of the asset.
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[33] The council's rulings answered the four questions in the affirmative in that the asset could be used repeatedly and once the pre-conditions were fulfilled, and there was a transfer of the same from the two contracting parties, the transactions were valid. *Hibah* was also valid although the same
E asset was used and the asset of the third party, in this case the shares of the appellant, could be used as a charged asset to guarantee the indebtedness.

[34] The learned judge had deliberated on the rulings of the council at length. After reviewing all relevant points, documents, and submissions of the parties, the learned judge concluded that the BBA transactions were valid
F and that the asset purchase agreements and the asset sale agreements were enforceable, the transactions that were undertaken by the respondent had met with the requisite features of financing premised on the *bai' 'inah* contract (which refers to an arrangement involving sale and buy-back transactions of the same asset by the seller and buyer) despite the same asset that is to say
G the shares having been used in the four asset purchase agreements and the asset sale agreements executed by the respondent and the company. Perhaps if we may add, the ruling made by the council pursuant to the reference made by the learned judge under s. 56 is binding on the court by virtue of s. 57.

[35] We have, in this regard, no difficulty in accepting the findings of the
H learned judge. As such, we cannot accede to the argument urged for the appellant that the BBA transactions were a sham, void and unenforceable.

Inconsistency Of Documents In The BBA Transactions - The *Contra Preferentem* Rule

I **[36]** It was argued on behalf of the appellant, that there was nothing in the letter of offer dated 17 April 2009 which provided that the appellant was to be liable to pay the respondent for any shortfall arising from the disposal of the shares. He then proceeded to refer to cl. 8.4 of the memorandum which according to him, was not considered by the learned judge at all adding that

the said clause which provided that the company should pay to the respondent the difference between the amount due and the amount realised was clearly inconsistent with cl. 6.1. Learned counsel then drew our attention to the case of *Sri Alam Sdn Bhd v. Newacres Sdn Bhd* [1997] 3 CLJ 640 wherein Siti Norma Yaakob JCA delivering the judgment of the court said:

> when trying to reconcile a document that contains words or clauses that are inconsistent or repugnant to each other, the primary consideration is to ascertain the manifest object and intention why such a document came into existence in the first place. Once such a purpose or intention has been ascertained, words or clauses which are inconsistent with such a purpose or intention are excluded.

[37] He went on to refer to *Johor Coastal Development Sdn Bhd v. Constrajaya Sdn Bhd* [2005] 2 CLJ 914 contending that the *contra preferentem* rule would apply in favour of the appellant. We should say that this is a rule of construction which one would bring to bear upon an agreement that where there is any doubt or ambiguity as to the construction of a contract or a term therein, one ought to construe it strictly against the party in whose favour it has been made (see *Burton & Co v. English & Co* [1883] Vol. XII 1883).

[38] The two clauses in our opinion are not inconsistent. Clause 8.4 reaffirms the company's obligation as the principal debtor to pay its debt to the respondent. In fact, it would not be necessary to spell out the company's obligation in the memorandum at all when it was not even a party thereto. The company's obligations were spelt out in clear terms in the letter of offer and its appendix 1 dated 17 April 2009. It goes without saying that the company as the principal debtor had an obligation to pay its debt and such obligation remained throughout the period during which the second BBA facility was enforceable even if cl. 8.4 was not provided in the memorandum. The memorandum was executed by the appellant in favour of the respondent and the terms therein including cl. 6.1 bound him. This reasoning assumes, as we understand it, that since cl. 8.4 of the memorandum requires the company to pay for the shortfall, the only party who is liable for the shortfall is the company and that the appellant's liability is to be limited to the shares only. The fallacy of the appellant's argument lies in the fact that in the event that the company is unable to pay the difference between the amount due and the amount realised, the appellant would not be liable to pay for the deficiency. As we have indicated earlier, the guarantee is to protect the respondent's interest. The company has a duty to pay its debt but if it was unable to do so, notwithstanding cl. 8.4, the guarantee would ensure that the appellant pay the respondent. As it turned out, the company had been wound up and was in no position to settle the outstanding amount. One of the purposes for any financial institution to require a guarantee to its financing facilities is to cater for such situation.

[39] The reliance on cl. 8.4 in our judgment is totally misplaced. The clause does not provide for the extent or limit of the appellant's liability. In truth, it deals with the company's liability as the principal debtor under the second BBA facility in the first instance. There are four separate clauses in the memorandum where the extent of the appellant's liability is set out. These are cls. 2.1, 6.1 and 16.1 which we have already dealt elsewhere in this judgment and cl. 23.1 which provides as follows:

> 23.1 Notwithstanding anything to the contrary contained herein, it is hereby agreed that on the satisfaction by payment or otherwise of the whole of the Indebtedness and/or the Bank's Selling Price due under this Memorandum of Deposit all the provisions contained herein shall cease to be of any effect ...

[40] On a plain reading of these clauses, the extent of the appellant's liability is without any doubt very clear. Clause 23.1 of the memorandum states that it is only when the appellant satisfies the whole indebtedness and/or the bank's selling price due under the memorandum that all the provisions of the memorandum would cease to be of any effect. What it entails, pursuant to the said clause, is that the guarantee that the appellant had provided in cl. 6.1 would require him to pay for any deficiency after the sale of the shares and that liability remained until the deficiency was fully satisfied by the appellant. It is only when this is fulfilled by the appellant that the entire provisions of the memorandum would cease to be of any effect. That was the extent of the appellant's liability. Accordingly, in the event that the company fails to pay its debt to the respondent, the appellant would by virtue of these clauses be liable to pay in the manner stipulated therein. Obviously cl. 8.4 of the memorandum cannot override these clauses on liability. The stipulations in cls. 8.4 and 6.1 are explicit and clearly expressed. There is indeed no conflict nor contradiction between both clauses. No ambiguity exists that would attract the application of the *contra preferentem* rule so that the preferred meaning should be the one that works against the respondent which relied on cl. 6.1. The stipulation in cl. 8.4 does not absolve the appellant from liability to pay for the deficient amount under cl. 6.1 of the memorandum. We see this argument as a mere attempt on the part of the appellant at augmenting his defence in the hope that we would be persuaded to decide the case in his favour. The argument is indeed untenable and we have very little hesitation in rejecting it.

[41] The appellant had also complained that the respondent's officer and solicitors had misrepresented to him that his liability was limited to the shares only. We have considered the judgment of the learned judge which made a finding of facts that no element of misrepresentation was proved by the appellant. Upon careful consideration of the evidence, we are satisfied that the learned judge did not misdirect herself on this issue.

Non-compliance With ss. 67 And 67A Of The Companies Act 1965 (Act 125)

[42] The question we have to consider is whether ss. 67 and 67A, in the form in which it stands in Act 125 covered the alleged dealing in the shares by the company through the asset purchase agreements and the asset sale agreements for the purpose of the second BBA facility.

[43] There could be no doubt that dealing in the company's own shares is not allowed in s. 67. However, under s. 67A of Act 125 shares buy-back is allowed to a limited extent, and in one instance in sub-s. (5), a cancellation of shares made pursuant to sub-s. (3E) shall not be deemed to be a reduction of capital within the meaning of Act 125. Apart from the letters of *hibah*, there were two other legal instruments involved in these transactions. These were the four asset purchase agreements which deal with the purchase of the shares by the respondent from the appellant at the purchase price of RM12,125,000 and the four asset sale agreements with respect to which the respondent sold the shares to the company at the selling price of RM16,087,500. The shares were the company's shares owned by the appellant. Thus, when the company repurchased the shares from the respondent could it be said that the company had in effect purchased its own shares? A question has therefore arisen inconsequence of these transactions touching on its validity which is whether or not the transactions had contravened both ss. 67 and 67A of Act 125.

[44] Before considering this issue, we set out below the provisions of ss. 67 and 67A of Act 125:

> 67. Dealing by a company in its own shares, etc.
>
> (1) Except as is otherwise expressly provided by this Act no company shall give, whether directly or indirectly and whether by means of a loan, guarantee or the provision of security or otherwise, any financial assistance for the purpose of or in connection with a purchase or subscription made or to be made by any person of or for any shares in the company or, where the company is a subsidiary, in its holding company or in any way purchase, deal in or lend money on its own shares.
>
> (2) Nothing in subsection (1) shall prohibit -
>
> (a) where the lending of money is part of the ordinary business of a company, the lending of money by the company in the ordinary course of its business;
>
> (b) the provision by a company, in accordance with any scheme for the time being in force, of money for the purchase of or subscription for fully-paid shares in the company or its holding company, being a purchase or subscription by trustees of or for shares to be held by or for the benefit of employees of the company or a subsidiary of the company, including any director holding a salaried employment or office in the company or a subsidiary of the company; or

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(c) the giving of financial assistance by a company to persons, other than directors, bona fide in the employment of the company or of a subsidiary of the company with a view to enabling those persons to purchase fully-paid shares in the company or its holding company to be held by themselves by way of beneficial ownership.

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(3) If there is any contravention of this section, the company is, notwithstanding section 369, not guilty of an offence but each officer who is in default shall be guilty of an offence against this Act.

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Penalty: Imprisonment for *five years or one hundred thousand ringgit or both.

(4) Where a person is convicted of an offence under subsection (3) and the Court, by which he is convicted is satisfied that the company or another person has suffered loss or damage as a result of the contravention that constituted the offence, the Court may,

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in addition to imposing a penalty under that subsection, order the convicted person to pay compensation to the company or the person, as the case may be, of such amount as the Court specifies, and any such order may be enforced as if it were a judgment of the Court.

E

(5) The power of a Court under section 354 to relieve a person to whom that section applies, wholly or partly and on such terms as the Court thinks fit, from a liability referred to in that section, extends to relieving a person against whom an order may be made under subsection (4) from the liability to have such an order made against him.

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(6) Nothing in this section shall operate to prevent the company or any person from recovering the amount of any loan made in contravention of this section or any amount for which it becomes liable, either on account of any financial assistance given, or under any guarantee entered into or in respect of any security provided,

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in contravention of this section.

67A. Purchase by a company of its own shares, etc.

(1) Notwithstanding section 67, a public company with a share capital may, if so authorized by its articles, purchase its own shares.

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(2) A company shall not purchase its own shares unless -

(a) it is solvent at the date of the purchase and will not become insolvent by incurring the debts involved in the obligation to pay for the shares so purchased;

(b) the purchase is made through the Stock Exchange on which

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the shares of the company are quoted and in accordance with the relevant rules of the Stock Exchange; and

(c) the purchase is made in good faith and in the interests of the company.

(3) Notwithstanding section 60, the company may apply its share premium account to provide the consideration for the purchase of its own shares.

(3A) Where a company has purchased its own shares, the directors of the company may resolve -

(a) to cancel the shares so purchased;

(b) to retain the shares so purchased in treasury (in this Act referred to as "treasury shares"); or

(c) to retain part of the shares so purchased as treasury shares and cancel the remainder.

(3B) The directors of the company may -

(a) distribute the treasury shares as dividends to shareholders, such dividends to be known as "share dividends"; or

(b) resell the treasury shares on the market of the Stock Exchange on which the shares are quoted, in accordance with the relevant rules of the Stock Exchange.

(3C) While the shares are held as treasury shares, the rights attached to them as to voting, dividends and participation in other distribution and otherwise are suspended and the treasury shares shall not be taken into account in calculating the number or percentage of shares or of a class of shares in the company for any purposes including, without limiting the generality of this provision, the provisions of any law or requirements of the articles of association of the company or the listing rules of a Stock Exchange on substantial shareholding, takeovers, notices, the requisitioning of meetings, the quorum for a meeting and the result of a vote on a resolution at a meeting.

(3D) Where the directors decide to distribute the treasury shares as share dividends, the costs of the shares on the original purchase shall be applied in the reduction of either the share premium account or the funds otherwise available for distribution as dividends or both.

(3E) Where the directors resolve to cancel the shares so purchased, or cancel any treasury shares, the issued capital of the company shall be diminished by the shares so cancelled and the amount by which the company's issued capital is diminished shall be transferred to the capital redemption reserve.

(4) The capital redemption reserve may be applied in paying up unissued shares of the company to be issued to members of the company as fully paid bonus shares.

(5) A cancellation of shares made pursuant to subsection (3E) shall not be deemed to be a reduction of share capital within the meaning of this Act.

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> (6) A company shall, within fourteen days after the shares are purchased, lodge with the Registrar and the Stock Exchange a notice in the prescribed form.
>
> (7) If default is made in complying with this section, the company, every officer of the company and any other person or
B individual who is in default shall be guilty of an offence against this Act.
>
> Penalty: Imprisonment for five years or one hundred thousand ringgit or both.

[45] It is a fundamental principle of law, replete with various
C pronouncements in a plethora of authorities, that a company is prohibited from purchasing its own shares since to do so would result in a reduction of its share capital. The prohibition applies even if there is an express power in the company's memorandum allowing it to do so. This prohibition exists at common law. The House of Lords in *Trevor v. Whitworth* (1887) 12 App
D Cas 409 laid down the rule that a company had no power to purchase its own shares (see also *Mookapillai & Anor v. Liquidator, Sri Saringgit Sdn Bhd & Ors* [1981] 1 LNS 89; [1981] 2 MLJ 114). The aim of such prohibition is to preserve the assets of the company and prevent a reduction of its share capital. Sections 67 and 67A of Act 125 in fact encapsulate this common law
E principle.

[46] The mischief that s. 67 is aimed at is the improper depletion of a company's assets to the detriment of its creditors. The creditors have nothing except the company's assets to look to in the event of insolvency (*Skelton v. South Auckland Blue Metals Ltd* [1969] NZLR 955 which is discussed in
F *Walter Woon Company Law* 2nd edn). The crucial point for the prohibition is the reduction in capital the purpose being the protection of the company's creditors. (see *The Annotated Statutes Of Malaysia: Companies Act 1965 (Act 125)*; *Gower's Principles of Modern Company Law, Fifth Edition*; *Walter Woon, Company Law Second Edition*).

G **[47]** Jessel MR in *Re Exchange Banking Co, Flitcroft's Case* (1882) 21 ChD 519 in summarising the general principle underlying this prohibition said:

> The creditor has no debtor but that impalpable thing, the corporation, which has no property except the assets of the business. The creditor, therefore, I may say, gives credit to that capital, gives credit to the
H company on the faith of the representation that the capital shall be applied only for the purposes of the business and he has therefore a right to say that the corporation shall keep its capital and not return it to the shareholders.

[48] Section 67(1) of Act 125 however does not impose absolute
I prohibition. Where it is otherwise expressly provided by Act 125, the prohibition does not apply. For example under s. 64, a company may reduce its share capital in any way and in accordance with the said section such as by paying off any paid-up share capital which is in excess of the needs of the company.

[49] A plain reading of s. 67, in particular sub-s. (1) thereof shows that the prohibition encompasses two situations or simply put sub-s. (1) can be divided into two limbs:

(a) Giving financial assistance for the acquisition of its shares or shares in its holding company; and

(b) Purchasing, dealing in or lending money on its own shares.

[50] The thrust of the first limb is the prohibition of providing any financial assistance by a company to anyone to purchase the company's shares. Reverting to the present case, we find no evidence to show that a financial assistance was given by the company to anyone to purchase its own shares. Accordingly, we hold that the first limb does not apply to the BBA transactions.

[51] As regards the second limb, it is abundantly clear that the company did not do any of those acts mentioned in s. 67(1). There is not one shred of evidence to show that the BBA transactions had resulted in the improper diminution or reduction of the capital of the company. Any of the acts by the company under s. 67(1) would involve expenditure of the company's funds return of its assets to the members or the creation of a contingent liability such as the provision by the company of a guarantee or security for the company. These would have the effect of indirectly depleting the company's assets or capital that would inevitably be to the detriment of its creditors. However, none of these things had taken place as a result of the BBA transactions.

[52] The main purpose of the prohibited transactions under s. 67(1) is to enable a person to acquire the company's shares. However, if the transactions do not result in the reduction of the capital of the company, there is no objection to a company dealing in its shares. A passage from *The Annotated Statutes Of Malaysia: Companies Act 1965 (Act 125)* reads as follows:

> A company might acquire its own shares in other ways than by purchase. For instance, a company could acquire a beneficial interest in its own shares under the terms of the will of a deceased member. This is perfectly legal in the United Kingdom provided the shares are held by nominees: see *Re Castiglione's Will Trusts* [1958] Ch 549. A company might forfeit a member's shares for non-payment of calls: see *Trevor v. Whitworth* (*supra*). Shares may be transferred to a trustee to be held on trust for the company: see *Kirby v. Wilkins* [1929] 2 Ch 444. In none of these cases does the company part with any money; as long as the assets of the company are not depleted, transactions such as these will be outside the mischief of the section.

[53] In *Kirby v. Wilkins*, *supra*, a partnership business was sold to a company for a sum of money which was satisfied by the allotment to the vendors of a number of fully paid shares in the company. It was subsequently discovered that owing to a mistake in the valuation, the partners had been overpaid by the company, and in order to adjust the matter, two of them voluntarily transferred to the chairman of the company 3000 shares upon trust to use or

A sell them for the benefit of the company. An action was commenced against the chairman and the company in which the plaintiffs (individual shareholders) claimed that the chairman held the shares as trustee for the individual shareholders and they also sought an injunction. Romer J delivering the judgment of the Court laid down the following principles:

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> 1. Now if that be a true statement of the principles enunciated in the case of *Trevor v. Whitworth*, and in my view it is ... , it is difficult to see which of those principles is infringed by the transfer that has been made in the present case. The company has not parted with one penny of its money, either in cash or money's worth. The company does not become a member of itself. The member of the company in respect of these 3000 shares is Mr. Wilkin, the defendant. It has not purchased its own shares, nor has there been a reduction of the company's capital. The capital issued, nominal and paid up, remains precisely what it was before, It is said, however, that there are two authorities which indicate that a transfer of shares to a trustee for a company is objectionable as a transfer of shares to the company itself. If money be paid for the transfer, I agree. If money's worth be paid for the transfer, I agree. If, as consideration for the transfer, the company purports to release the transferor from uncalled liabilities on the shares, I agree. But I know of no case that has decided that in a case such as the present one there is any objection to the transfer.
>
> 2. ... I cannot find in *Addison*'s Case any clear authority for the proposition that in the case of a transfer of fully paid shares to a company without any consideration moving from the company, the transfer is invalid.
>
> 3. In my opinion, this transfer of shares does not offend against any principle which has been laid down by any of the decided cases, nor, so far as I have been able to ascertain, any principle to be deduced from a consideration of the Companies Act.

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[54] In the above case, the transactions there in question involved an actual G transfer of the company's shares, however, in the instant suit, in the course of carrying out the transactions, there was no formal transfer of the shares in the sense that Form 32A was used in accordance with s. 103 of Act 125. What was being carried out in the transactions under consideration was the simultaneous sale of the shares by the company to the respondent and H purchase of the same by the company from the respondent for the sole purpose of conforming with the Islamic financing requirement for the BBA transactions. What is apparent is that the capital issued remained precisely what it was before.

[55] Learned counsel for the appellant, in submitting that the transactions I had contravened s. 67, had urged this court to accept that the second BBA facility was not a loan transaction, instead it was merely an asset sale and purchase transaction simpliciter between the company and the respondent. With respect to learned counsel, his argument is fallacious. The letter of offer

dated 17 April 2009 clearly states that the respondent had approved the Term Financing-i under the concept of "*Bai Bithaman Ajil*" which is an Islamic financing facility executed in accordance with Syariah law.

[56] We must emphasise that the execution of the sale and purchase of the property by parties involved is a prerequisite in the concept of Islamic financing of "*Al Bai Bithaman Ajil*". The sale and immediate resale of the property which are carried out by executing asset purchase and sale agreements form an essential step in this mode of Islam financing before the company could avail itself of the financial facilities provided by the respondent. Thus, it is wholly erroneous for the appellant to say that the BBA transactions were asset sale and purchase transactions simpliciter.

[57] This concept of "*Al Bai Bithaman Ajil*" and the manner of its operation are best illustrated in the case of *Dato' Hj Nik Mahmud Daud v. Bank Islam Malaysia Bhd* [1996] 1 CLJ 576; [1996] 4 MLJ 495. The plaintiff had executed the property purchase agreement and the property sale agreement with the defendant. There was a purchase by the defendant through the former agreement of Malay reservation lands (the said lands) for a price of RM520,000 which were then resold through the latter agreement to the plaintiff for RM629,000. Both the agreements were signed contemporaneously. The plaintiff's then attorney executed two charges of the said lands in favour of the defendant as securities for a loan of RM629,000. The loan was granted under the Islamic banking concept of "Al Bai Bithaman Ajil" (the BBA transaction). The defendant was not a Malay under the Kelantan Malay Reservations Enactment 1930 (the enactment). The approval of the Ruler-in-Council for the sale of the lands was not obtained. The plaintiff challenged the BBA transaction contending that as the lands in question were Malay Reservation Lands and as the defendant was not a Malay, the execution of the property purchase agreement contravened ss. 7 and 12 of the enactment. He therefore sought a declaration that the two agreements and charges were null and void and for the titles to the lands to be returned to him. It is important to note that s. 7 prohibits a person who is not a Malay from acquiring any Malay Reservation Land. Section 12 on the other hand, prohibits all dealings or disposals and attempts to deal in or dispose of reservation land contrary to the enactment. It further provides that no action shall lie for breach of contract in respect of any dealing in or disposal of or any attempt to deal in or dispose of any reservation land contrary to the enactment.

[58] The learned judge said, with reference to the words "attempts to deal in or dispose" that "... in terms of 'dealing', registration plays a pivotal role for it is in fact registration that 'vests' and 'divests' title". Since there was no registration of title with the land office, there was no dealing contrary to s. 12 of the enactment. Although the defendant was not Malay for the purposes of the enactment, no approval of the Ruler-in-Council was necessary as there was no actual transfer of the lands. Accordingly, there was no infringement of s. 7 of the enactment.

[59] The judgment of the learned judge had also touched on the BBA concept stating that it involved, as prerequisites, the purchase of the property by the defendant from the plaintiff and the immediate resale of the same to the plaintiff.

[60] At p. 305 of the judgment the learned judge said:

> It so happened that the execution of the property purchase agreement and the property sale agreement constituted part of the process required by the Islamic banking procedure before a party could avail itself of the financial facilities provided by the defendant. Hence, that would account for the contemporaneous execution of the two agreements, and in fact, it would be observed that the property purchase agreement would be rendered otiose and bereft of any consequential value the moment the property sale agreement was signed. For my part, I would say that that was what both parties had bargained for and they too had agreed that beyond this, to proceed no more. These prerequisites had been well understood by both parties.

His Lordship went further to say -

> Judicial decisions have shown that intention is an essential element in construing attempt.

[61] The decision of the High Court was affirmed by the Court of Appeal. In conclusion Abdul Malek Ahmad, JCA said:

> Concerning the applicability of equitable principles to the facts of the instant case, the learned trial judge had discussed the question of intention of both parties in signing the property purchase agreement and the property sale agreement which had been made quite clear from the agreements entered into and he was of the view that there was in fact nothing further to add.

[62] The principle that can be gleaned from the above case is that firstly, the execution of the property purchase agreement was sufficient, without more, to pass a beneficial title of the lands to the defendant to found the basis for the BBA transaction. Applying the said principle to the present suit, the four asset purchase agreements were sufficient to pass a beneficial title in the shares to the respondent. There was no necessity to do anything more for that purpose. In fact cl. 2 of the APA clearly states:

> Upon execution of this Agreement, all rights title and benefits to the Asset shall be deemed and passed to the Bank.

Secondly, intention of the parties in entering into the four asset purchase agreements and the asset sale agreements as clearly evinced therein is critical in construing the same.

[63] In this case, the intention of the parties was clear. The appellant was fully aware of the nature of the transactions and contents of the memorandum. Evidence was led during the trial that the memorandum and other documents were indeed signed by the appellant in the presence of two lawyers, Chief Financial Officer of the company and Company Secretary. He

cannot now claim ignorance of the provisions of the documents and seek to escape liability by raising some technical arguments which in our finding are without any basis.

[64] It is manifestly clear that the company did not do anything that is proscribed by s. 67(1) of Act 125. In fact, no loan, guarantee or security or any form of financial assistance was given by the company to anyone to buy its share. Neither did the company purchase the shares, deal with the shares or lend money on its own shares. We agree with the finding by the learned judge that the asset purchase agreements and the asset sale agreements executed by the respondent and the appellant were not caught by s. 67 and that the purported dealing had improperly depleted the company's assets. The transactions were genuine ones. We would observe that the contemporaneous execution of these agreements completed only in one day ending with the return of the shares to the appellant by the company by way of a voluntary gift were indeed genuine and *bona fide* transactions entered into in good faith for the purpose of securing corporate financing for the company.

[65] In this regard the, case of *Intraco Ltd v. Multi-Pak Singapore Pte Ltd* [1995] 1 SLR 313 CA (Singapore) which was discussed in *The Annotated Statutes of Malaysia, Companies Act 1965 (Act 125)* at p. 278 is relevant and we quote:

> In *Intraco Ltd v. Multi-Pak Singapore Pte Lte* (1995) 1 SLR 313 CA (Singapore), *City Carton (S) Pte Ltd* and *Multi-Pak* were both controlled by the same shareholders and debtors. *City Carton* owed a substantial amount to *Intraco*. It could not pay. In order to rescue *City Carton*, a scheme was proposed under which *Multi-Pak* would purchase the debts owed to *Intraco* by *City Carton*; in return for this, *Intraco* would subscribe for just under 20% of the share capital of *Multi-Pak*. The transaction was executed by *Multi-Pak* issuing a cheque for the debts to *Intraco* and *Intraco* simultaneously issuing a cheque for the shares of *Multi-Pak*. The two cheques were banked at the same time. It was argued on appeal (*inter alia*) that the transaction was illegal as it contravened Singapore's section 76 (equivalent section 67). Counsel for *Multi-Pak* contended that the debts acquired by *Multi-Pak* were worthless, and therefore *Intraco* had been assisted to acquire the shares. It was argued by counsel for *Intraco* that the transaction was in effect a debt-equity swap in the context of a corporate rescue, and financial assistance for the acquisition of the *Multi-Pak* shares was not the point of exercise. The Court of Appeal, having examined the commercial context of the transaction, concluded that "in effect, the shares were allotted by [*Multi-Pak*] for consideration other than cash" and that this did not amount to financial assistance.

The principle enunciated in the above case can be extended to apply to the present case. The transactions involving the purported sale and purchase of the shares are genuine commercial transactions which could be justified on purely commercial grounds. The acquisition of the shares by the company was a side-effect and not the point of the transactions. The point of the transactions after examining the commercial context of the transactions was

A in substance and in essence an exercise in the Islamic financing procedure in order to execute the second BBA facility for the purpose of granting the financing facility by the respondent to the company.

[66] We are satisfied that in all the circumstances, reasons and evidence point to the inevitable conclusion that there was nothing that the company B did in relation to the shares in this case had contravened s. 67 of Act 125. The submission of learned counsel for the appellant based on s. 67 is not supported by the terms of s. 67 itself. The second BBA facility in our judgment is valid and enforceable. Based on the foregoing reasons, we cannot accede to the argument of learned counsel for the appellant that the C transactions had contravened s. 67 of Act 125.

[67] We shall now turn to the issue of the alleged breach of s. 67A of Act 125. According to learned counsel for the appellant, the four asset sale agreements dated 24 April 2009 were a private arrangement of the disposal of the shares of the company by the respondent to the company as a listed D entity. Hence the sale, learned counsel argued, contravened s. 67A of Act 125. Section 67A provides a limited exception to the prohibition against shares buy-back by a company under s. 67. A listed company may now buy-back its shares on the stock exchange in accordance with s. 67A. This section was inserted by the Companies (Amendment) Act 1997 with effect from E 1 September 1997. The prohibition against shares buy-back in s. 67 applies to all companies until s. 67A was enacted. The section only allows a public company with a share capital, if so authorised by its articles, to purchase its own shares. However, the company is allowed to purchase its own shares only through the stock exchange on which the shares of the company are F quoted. This requirement, in our view appears to indicate that only listed companies are allowed to purchase its own shares.

[68] Learned counsel for the appellant had further submitted that if the shares buy-back by the company was valid the company was only able to do the following:

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(a) Cancel the shares so purchased; or

(b) Retain the shares so purchased as a treasury shares.

If the shares were retained as treasury shares the company was only able to do the following:

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(a) Distribute the treasury shares as dividends to the shareholders; or

(b) Resell the treasury shares in the open market in accordance with stock exchange rules.

The company, it was alleged, did not deal with the shares in accordance with I s. 67A.

[69] Based on s. 67A, a very significant point to note is that the first act that will trigger the application of this section is a purchase by a public listed company of its own shares. It goes without saying therefore, that if there is no purchase s. 67A does not come into play at all.

[70] In this case, following the letter of offer of 17 April 2009, the whole transactions began with a gift of the shares received by the company. There was no purchase so to speak. As such, the gift by itself did not offend s. 67A. The subsequent purchase of the shares by the respondent was followed almost immediately with the purported sale of the same to the company. So, does the last act by the company constitute 'purchase' of the shares in the sense of 'purchase' envisaged under s. 67A? It must be emphasised that the so-called 'purchase' of the shares under the asset sale agreements was in pursuance of an Islamic financing transaction that requires a sale and a buy-back of the shares. It was not a purchase as envisaged in s. 67A in the sense that the company uses its own funds to purchase the shares resulting in the shares being transferred to the company. Neither was it carried out for the purpose of stabilising the company's share price which is indeed one of the legislative intents of s. 67A in allowing shares buy-back by a company. The shares buy-back in the context of the present case in a nutshell, is actually a necessary step in the Islamic finance transaction, a requirement which is essential in order to complete the whole process of the Islamic financing procedure before it can be executed with the ultimate aim of disbursing the fund to the company for the purpose of the second BBA facility. In fact, this underlying reason has been recognised by the court in *Dato' Hj Nik Mahmud*'s case, *supra* and accordingly the purported shares buy-back by the company from the respondent was not a 'purchase' in the first instance that is envisaged in s. 67A.

[71] We have in the preceding paragraph stated that the shares buy-back in accordance with s. 67A results in the shares being transferred to the company. This is clearly evident by the provisions of sub-ss. 67A(3A), (3B), (3C), (3D) and (3E) which deal with cancellation of the shares purchased or retention of the shares in treasury and distribution of the shares. None of these could be done if the company does not have legal title to the shares.

[72] On the contrary, no legal title to the shares was ever transferred to the company in the present case. The company only had a beneficial title. The title to the shares remained with the appellant at all material times. The whole transactions were executed simultaneously on the same day. That being the case, what is being provided in sub-ss. 67A(3A), (3B), (3C) and (3D) could not be effected. Obviously, the transactions in this case are not the kind of transaction which is intended to be regulated by s. 67A. From the perspective of the *Intraco*'s case and *Kirby v. Wikins*, *supra*, it is abundantly clear that there was no reduction in capital when these transactions were genuinely executed. There could be no valid objection for the buy-back procedure in this case as it was necessary to complete the BBA transactions. Thus, as with s. 67, we are satisfied that s. 67A was not breached.

[73] Learned counsel for the appellant referred to s. 24 of the Contracts Act 1950 and urged this count to invoke the section as the BBA transactions were rendered illegal by virtue of the fact that ss. 67 and 67A had been contravened. We would like to emphasise here that as we have found that the whole transactions were valid, ss. 67 and 67A had not been contravened as such s. 24 of the Contracts Act 1950 does not apply. The learned judge in her judgment had proceeded to consider the effect of s. 24 on the assumption that Her Ladyship was wrong in deciding that ss. 67 and 67A Act 125 had been contravened, and ruled that on the authority of the Federal Court decision in *Lori Malaysia Bhd v. Arab-Malaysia Finance Bhd* [1999] 2 CLJ 997; [1999] 3 MLJ 81, s. 67(6) had excluded the application of s. 24. We do not wish to express any further opinion on this issue in view of Her Ladyship's clear pronouncement thereon which we completely agree.

[74] In the premises and for the reasons discussed, we find that the issue under consideration as regards the alleged breach of s. 67A of Act 125 is wholly unmeritorious. With deference to learned counsel, we reject his arguments on this issue and hold that there was no infringement of the section.

Conclusion

[75] The appellant's case in this appeal, in substance, is premised on the illegality of the second BBA facility, the liability of the appellant was to be limited to the shares only, the liability of the party for the shortfall was the company and the breach of ss. 67 and 67A of Act 125. It is obviously on these issues we think this appeal ought to be decided and our judgment goes on the basis that the second BBA facility was valid and enforceable, the appellant was liable to pay for the deficiency and that ss. 67 and 67A of Act 125 had not been breached. We have considered the evidence and the law very carefully. We do not detect any error as regards the learned judge's broad rendition of the facts of, and law applicable to, this case. The learned judge was quite right in allowing the respondent's claim and dismissing the appellant's counter-claim. We agree with Her Ladyship's judgment. Under the circumstances, we affirm the judgment of the learned judge in the court below and dismiss the appeal with costs of RM25,000 to the respondent. The deposit shall be accounted for costs.